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Ex-Alstom Exec's 2nd FCPA Acquittal Limits Agency Theories

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On Aug. 12, a three-judge panel of the U.S. Court of Appeals for the Second Circuit affirmed the post-trial acquittal of Lawrence Hoskins, a U.K. national who was a senior vice president at the French power and transportation company Alstom SA, on Foreign Corrupt Practices Act bribery and conspiracy charges.[1]

The court applied traditional common law principles of agency in holding that the principal must control[2] — sometimes described as "dominate"[3] — the agent in order to establish a principal-agent relationship under the FCPA.

Accordingly, this holding places a significant evidentiary burden on U.S. regulators looking to impose FCPA anti-bribery liability in the Second Circuit based on a theory of agency, and the opinion could have more far-reaching implications for FCPA enforcement nationally if it withstands any further appellate challenges and becomes another seminal decision from the Second Circuit in FCPA jurisprudence.[4]

Background

The Second Circuit's decision — referred to as Hoskins II — is just the latest in a series of notable rulings related to the U.S. Department of Justice's prosecution of Hoskins.

In July 2013, District of Connecticut prosecutors charged Hoskins with engaging in a scheme to pay bribes to Indonesian government officials in order to secure a $118 million contract for Alstom's U.S. subsidiary, Alstom Power Inc., or API, to provide power-related services in Indonesia — referred to as the Tarahan Project.[5]

Hoskins moved to dismiss his initial indictment on the grounds that he could not be subject to liability under the FCPA, even as a co-conspirator or accomplice, because he did not fall into one of the FCPA's enumerated categories of covered persons. The U.S. District Court for the District of Connecticut granted the motion in part.[6]

In 2018, the Second Circuit affirmed the district court's partial dismissal of the

indictment, holding that a person cannot be "guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal."[7]

In Hoskins I, the Second Circuit left open the possibility that Hoskins could nonetheless be held liable under the FCPA as an agent of a domestic concern.[8]

On remand, the DOJ pursued this theory and sought to prove that Hoskins was an agent of API.

At trial, the government introduced evidence that a consortium of Alstom entities, including API, hired consultants whose primary purpose was to pay bribes to Indonesian government officials to win the Tarahan Project.

Witnesses at trial testified that Hoskins was responsible for hiring these consultants and for pressuring API to front-load payments to these consultants in order to facilitate and expedite the bribe payments.

Following the trial, Hoskins was convicted on six counts of violating the FCPA, one count of conspiracy to violate the FCPA, three counts of money laundering and one count of conspiracy to commit money laundering.[9]

Following his conviction, the district court granted Hoskins' post-trial motion for a judgment of acquittal on the grounds that the government had failed to prove that Hoskins was an agent of API such that he could be held liable for a violation of the FCPA as an agent of a domestic concern.[10]

In its decision, the district court held that there was insufficient evidence for a reasonable juror to conclude that Hoskins was an agent of API.[11]

Hoskins II

On appeal, the Second Circuit, in a 2-1 panel opinion written by U.S. Circuit Judge Rosemary Pooler and joined by U.S. Circuit Judge Jon Newman, affirmed the district court's judgment of acquittal, holding that there was insufficient evidence for a reasonable juror to conclude that Hoskins was API's agent.[12]

While noting that the evidence presented at trial demonstrated that Hoskins acted at the direction of API and its executives to secure consultants for the Tarahan Project, the Second Circuit emphasized that there was no evidence in the record establishing that API actually controlled Hoskins' actions, an element that the Second Circuit described as fundamental to an agency relationship.[13]

In particular, the Second Circuit noted that API did not employ Hoskins, it lacked the ability to terminate Hoskins' employment, and it had no influence over Hoskins' compensation, which was set by a separate Alstom subsidiary.[14]

Further, the Second Circuit noted that there was insufficient evidence to conclude that Hoskins had "any authority to act on API's behalf," including to enter into agreements on API's behalf, or, conversely, that API had the ability to revoke any such authority.[15]

The Second Circuit reached this conclusion despite finding that "Hoskins's actions in furtherance of securing consultants for the Tarahan Project were all subject to the decision-making of ... executives of API."[16]

Moreover, the Second Circuit credited evidence that Hoskins identified and "hired consultants at the behest of API," and that he sought approval from API before hiring one consultant for the project.[17]

Nevertheless, the Second Circuit characterized the relationship between Hoskins and API not as an agency relationship but as a "collaboration between multiple corporate employees and subsidiaries to obtain the desired result."[18]

This holding is indicative of the particularized factual control that must be demonstrated to establish a principal-agent relationship, as the Second Circuit determined that even the evidence of close collaboration between API and Hoskins, or API's oversight of or influence over Hoskins, was not sufficient to permit a rational juror to conclude that Hoskins was API's agent.[19]

In a separate opinion, U.S. Circuit Judge Raymond Lohier dissented from the portion of the majority's opinion regarding the existence of an agency relationship.[20]

Relying on the highly deferential standard of review for post-trial motions, Judge Lohier concluded that the government had presented sufficient evidence of API's control over Hoskins' actions in connection with the conduct at issue in the Tarahan Project.[21]

In reaching this conclusion, Judge Lohier noted that the majority's agency analysis focused incorrectly, in his view, on whether API had the formal authority to control Hoskins' actions as a general matter, instead of on whether API had the power to control Hoskins' actions related specifically to the Tarahan Project, which the DOJ argued was the case.[22]

Judge Lohier also emphasized that if Hoskins could not be held liable as an agent, he would "evade accountability under the FCPA altogether."[23] Judge Lohier noted that such an outcome would create an incentive for U.S.-based companies to purposely organize themselves so as to avoid control over the foreign employees of foreign affiliates.[24]

These legal and policy-based arguments could be revisited if the Second Circuit undertakes en banc review of Hoskins II or as the DOJ litigates similar issues in other circuits.

A Series of Setbacks for the DOJ, but the DOJ Is Unlikely to Give Up the Fight

The Second Circuit's Hoskins II decision is the latest example of hostility by the federal courts to certain theories of extraterritorial application of the FCPA.

In addition to the Second Circuit's decision in Hoskins I and other lower court decisions in the Hoskins progeny, the DOJ suffered a defeat in 2021 in U.S. v. Rafoi-Bleuler.[25]

There, the U.S. District Court for the Southern District of Texas dismissed an FCPA conspiracy charge against the defendant, a Swiss citizen and resident,[26] for lack of jurisdiction.[27]

In its dismissal, the district court found that the defendant was beyond the reach of the FCPA because: (1) she was not an agent of a domestic concern,[28] and (2) no alleged co-conspirators engaged in overt acts in support of the alleged conspiracy within the territory of the U.S.[29] In other words, the court relied on reasoning similar to that articulated in Hoskins I.

The DOJ has appealed the Rafoi-Bleuler decision.

Despite these setbacks, the DOJ does not appear ready to concede the issue. The DOJ has vigorously contested each jurisdictional ruling in the Hoskins case, and it has received an extension of time within which to request en banc review of Hoskins II. And the DOJ has otherwise continued to assert expansive views of the FCPA's reach.[30]

Given the historical importance of agency in the DOJ's — and the U.S. Securities and Exchange Commission's — pursuit of extraterritorial application of the FCPA's anti-bribery provisions, and the DOJ's demonstrated willingness to litigate this and other issues that would extend the extraterritorial applicability of the FCPA, it is likely that this issue is far from settled.

Key Takeaways from Hoskins II

In the face of the DOJ's and SEC's continued efforts to pursue under the FCPA foreign individuals and entities that act wholly outside of the U.S., or their parent entities based on such foreign conduct, Hoskins II reminds us that, before agency liability can be imposed, there must be sufficient evidence of control or domination by the principal of the agent.

Those requirements, according to the Hoskins II court, are no less demanding in the context of the FCPA, even if that might constrain the extraterritorial reach of the statute.

As practitioners well know, regulators may broadly assert the existence of a principal-agent relationship as an underlying theory of jurisdiction in corporate FCPA enforcement actions to hold issuers or domestic concerns liable for the on-the-ground actions by employees or third parties of foreign subsidiaries or affiliates.

While common law principles have always provided a road map for defense counsel to develop relevant jurisdictional facts during an investigation and to engage with regulators regarding those facts in the face of an alleged agency relationship, Hoskins II brings into focus just how demanding and rigorous an agency analysis under the FCPA can be.

In that regard, defense counsel should craft investigative strategies that focus on relevant agency jurisdictional facts and, in appropriate cases, should hold regulators accountable to identify particularized facts establishing a purported principal's control or domination over the alleged agent in connection with the relevant undertaking.

This is particularly so in cases where the purported agent of an issuer or domestic concern — whether a subsidiary or an individual — acts wholly outside the territory of the U.S.

While those subject to an FCPA investigation should anticipate a fight from regulators on challenges to the viability of agency-based theories of jurisdiction and defenses to such theories, Hoskins II exemplifies the significant hurdles that regulators must overcome under common law agency principles as applied in the context of the FCPA.

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[1] United States v. Hoskins, No. 20-842,_F.4th _, 2022 WL 3330357 (2d Cir. Aug. 12, 2022) ("Hoskins II").

[2] See id. at *6 ("Th[e] lack of control over Hoskins is fundamental to the question of whether Hoskins was an agent because the 'chief justifications for the principal's accountability for the agent's acts are the principal's ability to select and control the agent and to terminate the agency relationship, together with the fact that the agent has agreed expressly or implicitly to act on the principal's behalf'").

[3] See, e.g., De Jesus v. Sears, Roebuck & Co., Inc., 87 F.3d 65, 69 — 70 (2d Cir. 1996) ("As a general matter ... a corporate relationship alone is not sufficient to bind a [parent corporation for the actions of its subsidiary] ... . Actual domination, rather than the opportunity to exercise control, must be shown." (alternation in original) (internal citation and quotation marks omitted)).

[4] See, e.g., Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber, 327 F.3d 173, 183 (2d Cir. 2003) (holding that the FCPA does not require that the government prove that an individual specifically knew that his conduct violated the FCPA); United States v. Kozeny, 582 F. Supp. 2d 535, 540 — 41, n.31 (S.D.N.Y. 2008) (holding that extortion and duress are viable defenses to FCPA charges).

[5] Hoskins II, at *3.

[6] Id. at *3.

[7] United States v. Hoskins, 902 F.3d 69, 97 (2d Cir. 2018) ("Hoskins I").

[8] Id. at 72, 97 — 98.

[9] Hoskins II, at *3.

[10] Id. at *4.

[11] Id.

[12] Hoskins II, at *1, 7.

[13] Id. at *6.

[14] Id. at *5 — 6.

[15] Id. at *6.

[16] Id.

[17] Id.

[18] Id.

[19] Id. at 7.

[20] Id. at *13 (Lohier, J., concurring in part and dissenting in part).

[21] Id. at *14 — 15.

[22] Id. at *16.

[23] Id.

[24] Id.

[25] United States v. Rafoi-Bleuler, No: 17-cr-00514, Dkt. 255, Mem. Op. and Order (November 12, 2021).

[26] Id. at 2.

[27] Id. at 1.

[28] Id. at 16.

[29] Id. at 17.

[30] See, e.g., Dep't of Justice, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 36 (2020) (emphasizing that the Second Circuit's Hoskins I decision limiting the scope of conspiracy and accomplice liability under the FCPA is the view of only one circuit court and citing United States v. Firtash, in which a U.S. District Court for the Northern District of Illinois declined to follow the Second Circuit's reasoning in Hoskins I and held that defendants could be prosecuted on a theory of conspiracy or accomplice liability under the FCPA even if those defendants could not also be held directly liable for a substantive FCPA violation).